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VOL. 32 JANUARY, 1957 No. 3

The President's Page

By WILLIAM P. GRAY,
President, Los Angeles Bar Association

William P. Gray

Due to the complex (and apparently inexorable) "deadlines" that govern the participation of the contributor, editorial staff, and publisher in the production of an issue of the BAR BULLETIN, if the comments written for this Page are still timely when they are read, such a happy result is fortuitous indeed. For example, as these lines are prepared the Association's Annual Christmas Hi-Jinks has just been presented. You will not read this until about February, but the appropriateness of expressing appreciation for outstanding service to the Association is hardly a seasonal matter, and I should like therefore to comment on last December's show.

The willingness of our members to devote their time and energy to the activities of the Association is a never ending source of inspiration to any proprietor of this Page, and the Hi-Jinks affords a perfect illustration. Louis M. Welsh, as Committee Chairman and producer and director of the show, began last winter to think productively concerning motif, continuity, skits, songs, and participants. With generous help from the members of his committee

and from such renowned contributors of ideas, lyrics, and dialogue as Mary E. Waters, Everett B. Clary, Grant Cooper, and Walter Ely, Lou had the script completed for an entire coordinated show by the middle of fall. Then he virtually took a month off from his practice and devoted himself to directing the many rehearsals, consulting with Stephen J. Grogan on arrangements for props, and accomplishing the innumerable details that are so vital to a successful dramatic performance.

Lou gave of himself, "far beyond the call of duty" in putting on the show, and those of us who made up the capacity house that enjoyed it are indebted to him and his staff accordingly. However, knowing Lew as I do, I rather suspect that this debt in large measure has already been repaid by the enthusiasm of the audience and by the comments of "one of the best shows yet!" that frequently have since been heard.

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Powers, Tenure and Compensation of the Presiding Judge of the Superior Court of Los Angeles County

PHILBRICK McCOY*

(The following article is from an address originally given November 7, 1956 before the Administration of Justice Section of Town Hall. A prior address in the same series given by the Hon. Roy L. Herndon was published in the December, 1956 issue of the Los Angeles Bar Bulletin.)

As you are aware, our Court with eighty judges is the largest single trial court of general jurisdiction in the United States. The Constitution requires these judges to "choose, from their own number, a presiding judge, who may be removed as such at their pleasure," and provides that subject to the regulations of the Judicial Council, the presiding judge "shall distribute the business of the court among the judges, and prescribe the order of business." (Const. Art. VI, sec. 7.)

The process by which we choose a presiding judge is quite simple. Under our local rules he is elected annually at a general meeting of all the judges held in November of each year. Time was when, for all practical purposes, the choice was determined by seniority. All a judge had to do to be sure of election was to outlive his seniors in point of service; when the appointed time came a ballot was cast assuring that the Court would have a new presiding judge during the coming year. We still elect the presiding judge annually by secret written ballot, but for seven years we have done so without reference to seniority. Under our present rules the Court is free to choose the judge who is considered most likely to be the best possible administrator of "the business of the court," and entrusts him for a year with the honor of the office and the heavy burdens that go with it other than the actual trial of contested cases.

In practical application the rule has worked well and the several choices made by the judges attest their wisdom in abolishing the old system based on seniority.

---

*Judge, Superior Court of Los Angeles County; Chairman, Superior Court Judges Committee on Court Organization.

What is it, then, that is required of this official who momentarily holds the title of presiding judge, and what is expected in addition to those requirements?

In the first place, you may look upon the presiding judge as somewhat comparable to the chairman of the board of a corporation. As such, he presides over the periodical meetings of the judges, appoints committees of all of which he is an *ex officio* member to advise and assist him in the discharge of his nonjudicial duties, and, when not otherwise occupied, serves as the chief public relations representative of the Court. While there may be as many as six meetings of the judges during the year, the demands upon the presiding judge to attend, and usually make a talk at meetings of the bar and interested groups of citizens here, there, and everywhere in the county are tremendous. Judge Herndon tells me that this year he has attended such meetings on an average of three times a week since he took office last January.

In his other capacity, the presiding judge may perhaps be likened to both the president and general manager of the corporation. It is here that I shall be rather specific.

Upon his election, the first duty of the presiding judge under the Judicial Council rules is to assign the individual judges to preside over these special departments and, of course, those who are to sit in the branch courts during the coming year. I should note here that throughout the year the presiding judge must see to it that all special departments are manned every day, notwithstanding the absence of the judges regularly assigned due to illness or vacation. The general allocation of the Court's business to these special departments and the branch courts is determined by our local rules. The judges not so assigned, approximately 35 in number, constitute what is referred to as the "civil pool," and are assigned to the trial of civil cases at the civic center. It is with respect to the cases tried by these judges that the presiding judge is confronted with his most severe headache—the supervision of what we call the civil master calendar at the civic center.

Now, just what is the "civil master calendar"? Basically, it is made up for each day from the list of civil cases which are at issue and set for trial. While the actual preparation of the list is a clerical task performed under the supervision of the presiding judge, the presiding judge must determine months in advance the size of the

daily master calendars to be set, basing his determination on the law of averages as to the manpower which may be available when the calendar is actually called. Every morning at nine o'clock he is confronted with the day's calendar, which averages from 65 to 70 cases presumably ready for trial that day. Somehow or other each day's calendar must be disposed of to make way for that of the next day. This is done generally through assigning cases out for trial before judges who are available, through continuances which do not reduce the case load, and by putting cases off calendar for one reason or another which may or may not reduce the case load. Of course, the difficulties of the presiding judge are compounded by the fact that he does not know until the close of business one day how many trial judges will be available to help him with the next day's calendar. Since the average case takes from two to five days for trial, it is at once obvious that the judges thus engaged are not available until the trial of the cases previously assigned to them have been concluded. Again, the civil pool may be further reduced through illness or the temporary assignment of a trial judge to sit in a special department or in a branch court.

One or two statistics will illustrate better than words the magnitude of the job which confronts every presiding judge in thus "supervising the civil master calendar." On January 1, 1954, the backlog of contested civil cases ready for trial was 8,550. It had climbed to 8,757 on January 1, 1955. By January 1, 1956, the backlog had reached 10,757 an increase of exactly 2000 in one year! Notwithstanding the fact that during the first nine months of 1956 some 4,101 contested cases were disposed of, which was 721 more than during the same period in 1955, the backlog was still in excess of 10,000 on October 1, 1956. The exact figure is 10,366. With these figures in mind you can well understand the steady pressure on the presiding judge. In my opinion the time has come when the presiding judge must delegate to another judge the discharge of his functions with respect to the civil master calendar.

The judicial day for the presiding judge is by no means at an end with the disposition of the civil master calender. I can only summarize here by pointing out that he must also be available to hear and determine a large number of *ex parte* applications for a great variety of orders and many emergency matters, to confer with his fellow judges and the many lawyers who come to his chambers

or call him on the telephone every day, and to find solutions for the inevitable problems, small and large, which relate to the distribution of the business of the Court. And every Monday morning at eight-thirty the presiding judge must meet some 200 new jurors and instruct them generally as to their relation to the Court and the nature of their duties.

With this necessarily brief outline of the judicial powers and duties of the presiding judge before you, let's take a look at his administrative functions and talk about the dollars and cents which come out of your pockets as taxpayers.

The Superior Court for Los Angeles is big business. Fifteen years ago (fiscal year 1940-41), when the Court had a complement of fifty judges, the County Treasurer paid out some $646,300 for its operation. Five years later, this had increased to $1,214,700. The fiscal year 1951-52 witnessed an outlay of $2,282,600. Today the Court costs the taxpayers of the County directly just a little less than $3,000,000. These sums represent the amounts appropriated by the Board of Supervisors for the direct support of the Court and do not include certain other very substantial sums which greatly enlarge the cost of operation. The first of these items is the State's share of the salaries of the judges. Of the $18,000 a year which each of us receives, the County only pays $9,500. The State pays the remaining $8,500 for an annual total of $153,000. The second is included in the budget of the Sheriff for the salaries of the 88 bailiffs serving the Court. For the fiscal year 1955-56 this amounted to $415,770. Lastly, we must include the appropriation of $1,783,-455 by the County for the same period for the operation of the County Clerk as ex officio Clerk of the Superior Court. Thus, for the fiscal year 1955-1956, the total cost of operating the Court payable by the taxpayers was somewhat over $5,250,000. Perhaps it should be added parenthetically that the County's share of this cost was just under one and one half per cent of the total budget of more than $357,671,000 for all general governmental operations of the County during the last fiscal year.

As the chief officer of one of the most important departments in the government of the county, the presiding judge is responsible for the preparation of the budget for the Court in co-operation with the Chief Administrative Officer of the County. He likewise represents the Court in maintaining all necessary contacts with the

C.A.O. and the Board of Supervisors during the year in relation to the business administration of the Court.

I have already referred to the standing committees of the Court, of each of which the presiding judge is an *ex officio* member. I can assure you he does not take this assignment lightly. Among those which consider the problems relating to our nonjudicial business are the Personnel and Budget Committee, the Reporters Committee, the Branch Courts Committee, the Legislative Committee and the Committee on Court Organization. The presiding judge regularly attends the meetings of these committees, which not infrequently start at four-thirty in the afternoon and continue on into the evening.

Under the constitution, the County Clerk is *ex officio* Clerk of the Superior Court. While this official is appointed by the Board of Supervisors, he is nevertheless an officer of the Court. In that capacity he has a staff of approximately 425. As the responsible head of the Court, the presiding judge serves as liaison between the Court and its Clerk in order that the Clerk's services and those of his subordinates may be rendered with maximum efficiency. The presiding judge must also keep in contact with the Sheriff whose office furnishes us with our bailiffs.

The Court itself is authorized by law to employ fifteen commissioners who serve in a quasi-judicial capacity. Their duties are assigned by the presiding judge. The Court also employs a secretarial and administrative staff with an authorized complement of 204, and a corps of 80 official reporters, augmented by a list of *pro tem* reporters. Although to a large extent these employees are under the immediate supervision of the Secretary of the Court, the presiding judge is ultimately responsible for efficient operation of the office of the Secretary and our clerical and administrative staff. This is necessarily a time-consuming job, even with the advice and assistance of the judges who serve on the appropriate committees.

The Court itself recognizes that there must be a substantial reorganization of the system for the administration of its nonjudicial business. To that end it has decided to seek legislation next year authorizing establishing the office of Executive Officer of the Court. Under the proposed legislation this officer, who presumably will be a member of the Bar, will be chosen by and serve at the

pleasure of the Court, and will exercise such administrative powers and perform such other duties as may be required of him by the Court. It is proposed that the Court shall fix his qualifications, and that we may delegate to him any administrative powers and duties as are now or may hereafter be vested by law in or required to be exercised by the Court itself. I anticipate that his salary will be commensurate with the work he will be called upon to perform. If we are fortunate enough to secure the adoption of such legislation, I feel sure that the burdens of the presiding judge will be materially lessened and that he will thus be freed to give more time to tasks which are rightly his.

So far, I have tried to give you a fairly complete sketch of the selection, tenure, powers and duties of the presiding judge. As to his compensation, I could be quite brief and simply say that, like the rest of us, he receives a salary of $18,000 a year. I should go on, however, and at least comment on the suggestions which have been discussed recently with respect to his selection, tenure and compensation. As to his selection, it has been suggested on occasion that he should be designated from among the judges of the court by the Chief Justice of the Supreme Court. This is based on the fact that the Chief Justice is chairman of the Judicial Council and as such is required by the Constitution to "seek to expedite judicial business" throughout the State. The thought seems to be that it would help him to do so if he could designate the presiding judge of the Superior Court in multi-judge counties. To me, the present system seems most satisfactory and I can see no need for adopting this suggestion. Others have suggested that, however selected, the presiding judge should serve for a period substantially longer than one or two years, in the interest of continuity of policy and efficiency of administration. This is quite logical and should be given careful consideration. Lastly, it has been suggested that the presiding judge should receive additional compensation while holding that office. This would be in line with the law which provides for a higher salary for the Chief Justice of the Supreme Court and the Presiding Justices of the District Courts of Appeal than the salaries of the Associate Justices of those courts. To my mind there is every reason why this suggestion should be adopted and none why it should not.

Desirability of Proposals for Disciplining Judges

HERBERT V. WALKER*

(The following article is from an address given before the Administration of Justice Section of Town Hall on December 12, 1956. A fourth article in this series by the Hon. Thos. P. White will be published in an early issue of the Los Angeles Bar Bulletin.)

There are two points I desire to make that will demonstrate that the proposed method to discipline judges is unnecessary and inadvisable, namely:

1. That there are existing procedures to adequately discipline judges, except in cases of mental and physical disability of a permanent nature, and these could be adequately provided for under the Retirement Act.

2. That the proposed procedure could seriously impair the independence of the judiciary.

The conditions that the proposed procedure purports to correct are as follows:

1. Wilful or corrupt misconduct in office or wilful refusal to perform any required judicial duty or lawful direction by the presiding judge of his court;

2. Addiction to narcotics;

3. Mental or physical infirmity;

4. Habitual intoxication, seriously and permanently interfering with the performance of his judicial duties.

5. Inexcusable and extended absence from judicial duties.

Turning to the first point, there are now four methods for the removal of judges:

1. Impeachment. Section 18, Article VI of the Constitution of the State of California provides for removal by impeachment for any misdemeanor in office.

2. Section 10, Article VI of the Constitution of the State of California provides for removal of a judge by a two-thirds vote of both houses of the legislature.

*Judge, Superior Court of Los Angeles County.

3. Article XXII of the Constitution of the State of California provides for removal of elective officers by recall. This provision covers judges.

4. By the electorate.

Any one of these methods can be employed to remove a judge for any of enumerated causes, except physical or mental impairment.

It is significant to note that all of these methods are actions by the people or their duly elected representatives. The only reason given for the adoption of the proposed amendment is that the methods now available are seldom used and are ponderous. In this connection, I would like to call your attention to the fact that in 1932 three judges of the Superior Court were recalled. In 1934, after impeachment failed in the senate, the electorate at the next election defeated the judge by electing his opponent. There are no less than three other cases in the records of this Court where judges, who have fallen in disrepute with the public, have been defeated at the next election. The only instance where judges are disqualified to serve and have not been removed from office by the electorate have been cases where the judges have not performed their duties and where judges have been mentally or physically disqualified, insofar as this case is concerned.

It is argued that the commission is necessary primarily for large and metropolitan areas, since in small communities the voter knows a judge and can keep himself informed as to his ability to conduct his office. This line of reasoning can be answered by considering the following:

In a large community the press makes it its business to police the conduct of the judiciary. If any judge does something which is corrupt or unseemly, he must immediately face the glare of publicity from the numerous newspapers and from television and radio news reports. In addition, we have in each large metropolitan area a number of able bar associations who make it their business to keep the public informed as to their disapproval of any errant judge. With these two strong controls on judicial conduct facing a judge, the press and the bar, the citizen of a large community can be as fully informed as a person of a rural community

with no daily newspaper, and with a judge who may sit only once or twice a month.

It should be the duty of the Judicial Council and also the members of the bar to bring any evidence of incompetence or malfeasance, or neglect of duty to the attention of the legislature. The fact that the impeachment procedure is infrequently used cannot be considered as an argument. An inference could be drawn that there is seldom need to resort to impeachment because of the grade of our judges. The very fact that impeachment proceedings were instituted with the attendant publicity and notoriety would in and of itself have an ameliorative effect on the judge involved regardless of the outcome and would act as warning to the balance of the judiciary. Because of the very nature of the office in our form of government, the removal of a judge should be conducted with all the formality and solemnity and gravity possible.

It is submitted that this can be achieved only through the existing removal procedures.

In the case of physical or mental disqualification, these conditions could be taken care of by proper amendments to the judges' Retirement Act.

Turning now to my second point, I need not remind you gentlemen that an independent judiciary is fundamental to the preservation of individual rights.

Vanderbilt, in his work, "The Doctrine of the Separation of Powers," states: "The independence of the judiciary in any system of law is the best test of the actuality of the rights of the individual."

Because of the high responsibility of the judiciary, the independence of the judiciary is the keystone of the American Constitution and Government by which we seek to uphold our national security and individual freedom. The Declaration of Independence, in enumerating the grievances against the king, states in part as follows: "He has made our judges dependent upon his will alone for the tenure of their offices and the amount of their salaries."

The text accompanying this report states in part as follows: "The independence of the judiciary is of the utmost importance in our judicial system. So important is it that few restraints may be imposed without endangering it."

It must be kept in mind that judges are elected officials and

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derive and maintain their office by the will of the people and such must be the case if the judiciary is to maintain its independence.

Now let us look to the composition of the proposed disciplinary commission. The Commission on Judicial Qualifications shall consist of one member of the Supreme Court, together with a justice of each of the four Appellate Districts of the state, all to be designated by the Chief Justice. While I am positive that the present Chief Justice is not of a mind to control or would try to control the composition of this body, we must keep in mind that it is a possibility and that the Chief Justices change, the same as any other official. It does not take any great power of discernment to see how a designing individual could control the composition of the disciplinary body and thereby control the disciplinary proceedings. The present Chief Justice, in discussing a similar proposal, is quoted in the local press as saying: "Most judges called before the Commission would probably leave the Bench of their own volition."

Under the proposed provision, disciplinary proceedings can be initiated as follows:

Upon (1) motion of the Chief Justice, *or* (2) motion of the State Bar acting through its Board of Governors, *or* in the large courts of the state having twenty or more judges (3) upon motion of the presiding judge of such court made with the concurrence of a disciplinary committee consisting of, and elected by the judges of that court.

Likewise it is apparent that the action is controlled not by the people, but by the judiciary itself. There is no other elected official subject to such control or alleged discipline.

The existence of such a commission with removal or disciplinary powers would present a threat to judicial independence. Fear of the consequences might tend to inhibit or influence a judge in dealing with a case involving a politically or economic controversial subject matter or an important and influential pressure group.

There is no valid reason to single out one of our three branches of government for special or restrictive treatment concerning this disciplinary removal. No commission with disciplinary or removal powers has been set up as watch dog over the Governor or the Attorney General. No such commission sits in judgment on the

members of our State Legislature. These powers have been retained by the people.

To keep the necessary independence of the judiciary, the power to suspend or remove should remain in the people or their duly elected representatives. The proposed procedure amounts to substituting a commission for the people with the power to say to the people, "You elect them and if they do not suit us we will reject them."

Our government is founded on the fundamental principle of the separation of powers. To preserve this principle, the power to remove judges should remain in the people or their duly elected representatives.

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WILLIAM A. SHERWIN*

A short time ago one of the executives of an eastern manufacturer, recently located in this County, in appearing before the Hearing Board of the Air Pollution Control District on a petition for a variance, stated that while he knew that ignorance of the law was no excuse, nevertheless, he felt that some consideration should be given to the fact that when this eastern company purchased a local plant the lawyers, who represented the purchaser, gave not the slightest heed to Chapter 2, Division 20, of the Health and Safety Code of the State of California, nor to the Rules and Regulations of the Air Pollution Control District of the County of Los Angeles.

The above was not the first instance when clients who have invested considerable sums of money in this County have received an unpleasant surprise after a visit from an inspector or an investigator from the office of S. Smith Griswold, Air Pollution Control Officer.

It is natural enough for a purchaser, for example, of an apartment house which has a chute fed incinerator, to blissfully appraise the property, pay what he thinks is a reasonable price, and go on rejoicing collecting rents.

The rude awakening comes just a little gradually. A polite person tells him that as the new owner he must obtain a permit to operate this incinerator and also tells him where to apply for that permit, probably even gives him the form to fill out. So, maybe a little cautiously, but still in a not too unhappy mood, he applies. The engineer who processes the application can practically smell the garbage which shoots through the chutes to the grate and then becomes re-cooked. He therefore, without delay, causes a communication to be sent to the applicant advising him in no uncertain terms that a permit to operate is denied because the incinerator in question cannot be expected to operate without periodically violating Section 24242 of the Health and Safety Code, and either Rule 50 or Rule 52, of the Rules and Regulations of

*Of the Los Angeles Bar. Chairman, Hearing Board, Los Angeles County Air Pollution Control District.

A Survey of
METROPOLITAN TRIAL COURTS
LOS ANGELES AREA

—by Professor James G. Holbrook of the University of Southern California School of Law

—conducted under an $80,000 grant from The John Randolph Haynes and Dora Haynes Foundation

—published under the auspices of the Administration of Justice Section of the American Bar Association

—Foreword by the Honorable Earl Warren, Chief Justice of the United States

Chief Justice Earl Warren says in his Foreword:
*"This report on the trial courts of Los Angeles County is certain to become an important public document. It should challenge the interest of every citizen of the county because it affects the welfare of each of them. All of its 8,000 lawyers should study it carefully because it vitally affects their profession and points out some of their responsibilities in helping to bring about a better administration of justice. * * * The problems of judicial administration in Los Angeles County are great and, of necessity, will continue to be great. But of this much we may be sure — they are problems of growth and not of stagnation. * * * This report should have much more than local significance."*

This volume of 452 pages is a comprehensive report on a three-year survey of the trial courts in Los Angeles County, directed by Professor Holbrook with the assistance of three full-time research associates, each a lawyer. Professor Holbrook, a member of the California and Illinois bars, combines twenty-three years of active practice with seven years as a law school professor.

As a thorough and objective study of the trial courts in Los Angeles County the survey affords:

—**For the judge:** An insight into his relationship to the court system as a whole and of the part played by the many agencies connected with the courts.

—**For the lawyer:** A practical hand-book describing the procedures in all the departments and divisions of the Los Angeles trial courts, including probate, domestic relations, conciliation, criminal, juvenile, psychopathic, and traffic.

—**For every citizen:** A description of the functions of courts, judges, juries, lawyers and other agencies and personnel connected with the courts, with specific recommendations by the Director of the survey as to what should be done to improve the Los Angeles County trial court systems.

Among the subjects covered by the recommendations are:

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C. Qualifications Commission for Appointment of Judges
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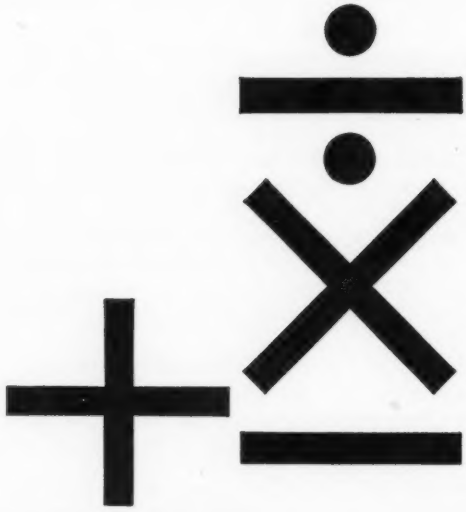

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the Air Pollution Control District which relate to opacity and quantity of particulate matter. Either one of the above reasons is sufficient for the denial of the application, because under Rule 20 of the Rules and Regulations the Air Pollution Control District is required to deny an authority to operate equipment, the use of which may cause the issuance of air contaminants in violation of Section 24242 or 24243 of the Health and Safety Code.

If the application involves equipment other than an incinerator, reference may also be made to Rules 52 and 53 and Section 24243.

Some clients are slightly displeased with their counsel (See your Errors and Omissions policy)—just for example, take the purchaser of the apartment house who will be required to spend a few thousand dollars to install proper equipment or provide hauling. These oversights can run into important money.

The operators of many apartment houses, office buildings, factories, and lumber yards, and other businesses, are using equipment which comes under the grandfather clause (Rule 13, Rules and Regulations). However, neither the grandfather clause nor any other permit goes to the equipment—they run only to the operator and do not pass with the equipment.

All transfers of apartment houses designed or used for a dwelling of more than four families require a permit for operating an incinerator and each vendee of such a property, or any other property using air pollution control equipment, must obtain an operating permit if he does not have the pollutants disposed of by other means, such as a cut and fill operation or means of destruction.

There are many types of equipment in operation in this County which have received the approval of the engineers in the office of the Air Pollution Control District and which will receive an approval to operate after a transfer. The men in that office will give you cordial and careful consideration if you consult them before closing some transaction which might cost your client a great deal of money, and also cost you a client.

The example given is an apartment house incinerator, but every transaction involving business should take the relevant provisions of the Health and Safety Code and the Rules and Regulations of the Air Pollution Control District into consideration.

Outmoded equipment can be caught up with on a transfer of any business establishment. Some equipment once approved may

be obsolete under the increased restrictions in the engineering department of the Air Pollution Control District which is bound by Rule 20. A purchaser should be advised of all of these possibilities before he agrees upon a purchase price because his investment or his cost of operation, or both, may be much more than he anticipated. He should know that permits are not transferable from person to person or from place to place (Rule 12).

I also direct the attention of the "tax-wise" attorneys to the fact that the change of entity from a partnership to a corporation or from a corporation to a partnership, or back and forth again, may also involve something they never thought of.

There is a field for the practice of law on behalf of clients concerning Air Pollution Control problems, both at the Hearing Board level and before the case reaches the Hearing Board. The members of the Hearing Board are many times astounded to note that firms doing a tremendous volume of business in this County fail to recognize how serious the consequences of non-compliance may be.

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TAX REMINDERS

TAX-FREE EXCHANGES OF PROPERTY

JOHN G. GEMMILL*

Section 1031 of the Internal Revenue Code of 1954 provides for non-recognition of gain or loss from the exchange of property solely for property of a like kind. However, the property exchanged must be property held for productive use in trade or business, or for investment, and not any of the following: stock in trade, other property held primarily for sale, securities, receivables, or evidences of indebtedness.

No problem arises in the exchange of real property clearly held for productive use or investment for other real property; the exchange is clearly tax-free. Nor does any problem arise on the exchange of real property which has been clearly held for sale to customers for other real property; the exchange is not tax-free. However, a perplexing problem exists where a taxpayer exchanges property which, because of his prior activity in selling real property, is in the twilight zone between property held for investment or productive use, and the holding of it for sale to customers. Assume that A has owned and operated an orange grove for many years. In recent years, he has made little money from its operation, and prior to December 31, 1953, A made four occasional sales of building sites over a two-year period, while continuing to operate the remainder of the property as an orange grove. Since December 31, 1953, he has made two additional such occasional sales. During the same period, A subdivided, improved and sold off to individual customers most of the lots in a tract of land a few blocks away, but still has a few such lots which are unsold and are still being held for sale. This latter activity denies to A the benefits of Section 1237 of the Internal Revenue Code of 1954, insofar as the orange grove land is concerned. While the Regulations under Section 1237 provide that that section is not the exclusive test as to whether property is held for sale to customers, the decided cases which must be considered in conjunction with Section 1237 leave in considerable doubt

*Of the Los Angeles Bar. Member of the Taxation Committee, Los Angeles Bar Association.

the question as to whether, under these facts, A would be held to be holding the remainder of the orange grove property for investment or productive use.

Let us assume that thereafter A has an opportunity to exchange the balance of the orange grove property for an apartment house. His right and obligation to transfer his cost basis on the remainder of the orange grove property to the apartment house, or his obligation to pay a tax at ordinary income tax rates on the difference between that cost basis and the fair market value of the apartment house, would be open to serious question.

WHEN DOES A CORPORATION'S EXISTENCE TERMINATE TAXWISE?

WILLIAM HALPERN*

The precise time when or within which a corporation ceases to exist may be greatly significant under the federal income tax laws. It marks the end of its last taxable year, and is determinative of many tax questions, as, for example, the due date of the return, the computation of the tax (usually when the corporation's taxable year straddles the end of a calendar year), the computation and, sometimes at least, the existence of, the net operating loss benefits, the validity of a deficiency assessment, and whether an item of income is taxable to the corporation or to the liquidation distributees.

Further, cessation of existence, being often tied in with completion of liquidation, also determines the eligibility of the corporation or its shareholders to certain special tax benefits, such as those afforded under I.R.C. Section 337, popularly called the Court Holding Section, under Section 333, the one-month liquidation statute, and under Section 334(b), popularly called the Kimball Diamond Section.

Tax gatherers are concerned with substance rather than form. Accordingly, the formality of filing the final certificate of dissolution may not conclude the corporation's existence and, conversely,

*Of the Los Angeles Bar. Member of the Taxation Committee, Los Angeles Bar Association.

the failure to file such certificate may not cause such existence to continue. Indeed, our own Corporation Code provides for the continuance of the existence of a corporation for the purpose of completing its winding-up. Nor can the rule of substance versus form be escaped by resorting to empty measures solely for the purpose of deferring the cessation of corporate existence, such as, refraining from distributing cash or other passive assets or investments.

Some Courts at least have taken the position that when a corporation has ceased all operations and completely liquidated, then, and not until then, it has ceased to exist for tax purposes.

If, during the period of winding-up, there are minor or trivial tail-end transactions, the Court may treat such transactions as being de minimis, and determine that the corporate existence ended at a time prior to the occurrence of such minor or trivial transactions.

The de minimis rule, however, is one to be relied upon more safely by the government than by the taxpayer. It appears that the rule figures far more prominently in working against the taxpayer than for him.

If, then, the precise date when or within which the cessation of the corporation's existence becomes significant, it becomes necessary to complete all operations and all liquidation activity prior to the significant date. If a corporation has extensive operations, assets or liabilities, such completion is not so easy to accomplish, for unanticipated transactions are almost bound to occur. In such a case it is perhaps desirable to complete cessation in advance of the significant date. Even in the case of the exercise of every precaution and the apparent completion of such operations and liquidation at or prior to the significant date, the Court may still determine that the corporation existed until a date subsequent to the apparent significant date. This could occur, for example, where income is realized at a date subsequent to the significant date and is regarded by the distributees as realized by themselves, while the Court concludes that such income has been realized by the corporation and upon such subsequent date. In such a case the Court will determine that the corporation existed upon the subsequent date, for it then had a transaction from which it realized income.

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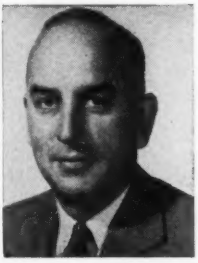
Silver Memories

Compiled from the World Almanac and the L.A. Journal of December, 1931 and January, 1932, by A. Stevens Halsted, Jr.



A. Stevens Halsted, Jr.

The Seventy-second Congress convened at Washington with the Democrats, for the first time in 12 years, controlling the House. Representative **John N. Garner** of Texas was elected Speaker. **Bertrand N. Snell,** Republican of New York, was elected Republican floor leader.

* * *

Chiang Kai-shek, member of the Soong family, resigned as President of the Chinese National Government and as Generalissimo of the armies. Lin Sen succeeded him as titular head of the National Government. Chang Hsueh-liang resigned his command of the Chinese forces in Manchuria to his uncle, Chang Tso-hsiang, brother of Chang Tso-lin.

* * *

Oliver Wendell Holmes, who will be 91 on March 8 (1932) resigned as an Associate Justice of the U. S. Supreme Court.

* * *

In Bombay, India, **Mahatma Gandhi** was arrested by the Government on the eve of his new civil disobedience campaign. His aide, **Jawaharial Nehru** was sentenced to 2 years in prison at hard labor. The All-India Nationalists Congress was outlawed.

* * *

The U. S. Senate, 63 to 8, and the House, 335 to 55, passed the first of the administration's major relief measures—the $2,000,000,000 Reconstruction Finance Corporation bill for emergency financing for banking institutions, building and loan societies, railroads and agriculture.

Japanese forces, including 2,500 marines, attacked and occupied Chapel, the Chinese-Administration district of Shanghai, lying just north of the International Settlement. The U. S. and Britain protested that this Japanese action at Shanghai menaced the International Settlement. The provocations alleged were the Chinese boycott against Japanese goods and merchants and "general restlessness" causing "extreme anxiety for the safety of Japanese in the area." The Japanese War Office declared that no action by the League of Nations would alter Japan's policy, and warned that the League's intervention might precipitate a "world conflagration."

* * *

In its first direct vote on the wet and dry issue since prohibition began 12 years ago, the U. S. Senate rejected, 55 to 15, a resolution by Bingham of Connecticut, suggesting to governors of the states that they recommend to their legislatures referenda on repeal and modification of prohibition.

* * *

Admission to the Capitol and to the White House was denied to the "hunger marchers" who after their trek sought to present to Congress and to President **Hoover** their demands for a Federal guarantee of a minimum wage and the enactment of national unemployment insurance legislation.

* * *

Charges by a sub-committee of the Wickersham Commission on Law Observance that the prosecution and police violated the law in the trial of **Thomas J. Mooney** in San Francisco in 1917 were revealed by a report submitted to the U. S. Senate by Attorney General **Mitchell.**

* * *

Wright Patman, Democrat of Texas, offered a resolution in the House seeking the impeachment of **Andrew W. Mellon,** Secretary of the Treasury. The charges were denied at a hearing by counsel for Mellon who said he had no bank stocks, never tried to get the Barco oil concessions in Colombia by personal talks with President **Olaya,** and does not own a distillery. Mellon resigned later to become Ambassador to Great Britain and the charges were dropped. **Ogden L. Mills** became the new Secretary of the Treasury.

Brothers-In-Law

By George Harnagel, Jr.

George Harnagel, Jr.

Many lawyers complain these days about the multiplication of law books and the expense of acquiring, maintaining and housing an adequate law library. This department is happy to report that it has made a giant stride toward the solution of this problem.

We refer to our recent acquisition of a single volume a little less than three inches thick, the scope of which is indicated by its title: "Laws of Business for All the States and Territories and the Dominion of Canada with Forms and Directions for All Transactions, and Abstracts of the Laws of All the States and Territories on Various Topics." With a few more volumes like that on our desk it seems likely that we can clear the books out of our presently over-crowded library and add it to our presently under-crowded reception room in anticipation of a larger clientele that will undoubtedly be attracted by the increased efficiency with which we can dispatch our business and theirs.

The author of this noble volume is Theophilous Parsons, LL.D. who is described *inter alia* as: "Late Professor of Law in Harvard University." The first edition was published in 1878, but we were fortunate to secure the "New Revised Edition," published in 1902.

While it is a bit lacking in modern frills such as income taxes and the law of outer space, it has all the good old basic subjects that are still with us, and probably always will be—like contracts, sales, agency, real property, married women, and so on. It wraps up an esoteric subject like admiralty law in about 50 pages, complete with forms, and marine insurance in less than 30 pages more. It also equips us, if occasion presents itself, to practice in some

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fields which are now a bit out of fashion, such as the law of apprenticeship or even the law of manure, both of which at one time seem to have provoked some lively controversies.

We got this gem at a bargain, too. For some unaccountable reason it had been marked down from 10c to 5c. If what this country *really* needs is a good 5c law book, we have it.

* * *

The Shingle of the Philadelphia Bar Association is our authority for this report:

> City Solicitor Dave Berger was arguing a case before the Supreme Court [of Pennsylvania], when Justice John C. Bell was moved to remark, "Mr. Berger, you are a thousand percent wrong!" . . . Undaunted, Dave continued to argue, whereupon Justice Bell opined, "I'm sorry, Mr. Berger, but you're a hundred percent wrong!" . . . Which moved Justice Charles Alvin Jones to suggest, "Keep it up, Mr. Berger. You're making terrific progress."

* * *

The Good Old Days

"The young lawyer, about whom I know the most, finished law school in 1924 and secured employment in a large firm in a northern city. He was instructed to report to work the Monday following the bar examination, with an admonition from the managing senior partner to the general effect that "We start to work by 8:30; we take an hour off for lunch, if we need that much, and we leave the office at 5:30 if we are through with our work." Saturday was a regular business day until noon, and about every third Saturday one of the younger associates, with an office boy and secretary, manned the office until 5:00. On most Sundays, the library was well populated. Compliance with the rules was insured by the managing partner opening doors of the associates' offices on his arrival in the morning and again on his evening departure—perhaps it was just to say good-morning, or good-evening, but the grunt he emitted was not always capable of being interpreted." —Eugene Glenn in *Dicta*, published by the **San Diego** Bar Association.

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